The Oldest Case in the Court System

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Body

[Author's Note: Throughout the years, judges have been under enormous pressure to settle cases in order to reduce the bulging inventory of civil cases awaiting trial. In 1986, Chief Judge Sol Wachtler with the deft assistance of then New York County Chief Clerk and Executive Officer of the Supreme Court, New York County Civil Term Jonathan Lippman established what became known as the IAS or Individual Assignment System under which an individual judge would be responsible for a case from beginning (motion practice) to end (trial). It was thought that the efficiencies of having a case overseen by just one judge would help streamline and dispose of more cases than previously under what was known as the Master Calendar System where cases would proceed to different Court Parts depending on the trajectory of the case. The IAS system found its principal focal point in the Supreme Court, New York County although its tentacles extended throughout the state. It was a visionary program of court management but I think it's fair to say it didn't work.

This story is a fictionalized amalgam of many actual instances that I experienced in my years as a trial judge serving in the Supreme Court, New York County's Civil Term. It depicts the pressures that existed on all of us before IAS, during and beyond to deal with the case load that kept growing and growing and especially those cases that we commonly called "old dogs," the ones that just wouldn't ever disappear. Here is one such case. The story was first told in a New York Law Journal story under the same title on October 16, 1989. It has been modified and is re-published here.]

T he lawyers and their seconds edged their way into the judge's chambers. The Part Clerk moved past the assemblage and presented the learned judge, sitting at one end of a long rectangular table, with a well-worn faded case card known otherwise as a Note of Issue card establishing that the case was trial ready and which detailed the nature and chronology of this unusual matter. The calendar number in the upper left hand indicated a case so ancient that the judge knew immediately that the judicial administrators would be watching his handling of it with great interest.

"Ah, marked final, final" said the judge. "Well, maybe before I send you down to pick, I'll try to settle this thing."

"If anyone can settle it, it's Your Honor," intoned one of the lawyers well practiced in the art of flummery.

"All right, fellas," said the judge "sit down; plaintiff on my left."

The judge examined the case card carefully and noted that this seemingly simple matter first appeared on a court calendar well before the IAS system began on Jan. 3, 1986.

"What's this about?" said the judge looking at the plaintiff's lawyer.

"It's a simple case, judge, my client was crossing 14th Street and tripped on a defect in the street. Here's some pictures." "What's the injury?" said the judge.

"My client suffered a severe fracture of the distal radius," said the plaintiff's lawyer. "Permanent loss of flexion." "Any hardware?" said the judge.

"No, Your Honor; it was a closed reduction."

"This case is worth, at a minimum $125,000 judge," said the plaintiff's lawyer.

"That's an awful lot for a simple fracture," the judge replied.

"It was only a chip fracture," Your Honor, chimed in one of the defense lawyers; "the case isn't worth more than $7,500."

"Judge," piped up a lawyer in the back of the room, "we've just been brought into the case. We haven't even had an EBT or a physical. This case should be marked off the calendar."

"Marked off!" screamed the plaintiff's lawyer. "Judge, I think this lawyer represents an eighth or ninth party defendant. My client has been examined nine times by nine separate lawyers at nine different depositions and in addition has undergone nine different physicals by nine separate physicians. Enough is enough."

"Your Honor," said this newly arrived lawyer, "my client has a right to a defense and without an EBT or a physical, well ..."

The judge quickly broke in, "O.K., O.K., let me see what this is all about. All of you, keep quiet! Let me see what this card says."

Examining the hieroglyphics on the card, the judge's expression changed from puzzlement to incredulity. The card revealed that the case involved a pedestrian who fell as a result of stepping in a depression in the roadway. The cut in the roadway was adjacent to a Consolidated Edison manhole cover. Accordingly, the plaintiff had named the City of New York and Con Edison as defendants.

"Looks like it's both your cases," said the learned judge looking sourly at both the representative of the city and the lawyer for Con Edison. "I would say it's a 50-50 split." "We won't pay a dime, Judge" intoned the City's representative. "There's no prior written notice."

"We don't need Big Apple notice," said the plaintiffs' lawyer. "The city was affirmatively engaged in repairing the street. We have proof of that. They had an affirmative duty here; that takes the case out of the prior written notice requirement."

"YOU'RE NUTS," shouted the city's representative, a slender, elegantly attired, silver-haired gentleman who held an expensive unlit Cuban cigar in his fingers. "Judge, you'll have to dismiss this as a matter of law."

"Isn't that what you said about the case against the City I hit on in the Bronx a month ago," shouted the lawyer.

The two combatants eyed each other with fury, and the learned judge thought that before fisticuffs occurred it might be advisable to utilize his acknowledged skills at settlement.

"What about you?" the judge snarled looking directly at Con Ed's lawyer. "How about some money from you?" "That depression had nothing to do with our manhole cover," said the Con Ed lawyer.

"Does that mean you have no money on the case," said the judge. "That's it Your Honor; not a sou."

With this turn of events, the judge knew that his mettle as a settler of unparalleled ability would be sorely tested.

A further examination of the tattered card revealed the identities of successive defendants. Con Edison, apparently believing that the telephone company had perhaps undertaken repairs in the area brought them in as a third-party defendant. Not to be outdone, New York Telephone found ample grounds to implead the New York City Transit Authority. The Transit Authority having examined their considerable records pointed the finger at Interboro Construction Company. Interboro said it couldn't be us and sued Trimacine Construction Co., which quickly summoned Perez Asphalt Construction to the litigation. Perez brought in Broadway Maintenance who sued Utilities Unlimited. Utilities turned its attention to Edenwald Construction who then sued Schiavone Construction.

The card revealed that at each juncture when a new party was brought into the action, the judge marked it off the calendar to give the newly impleaded defendant time to depose the plaintiff and all prior defendants and to take a physical examination of the plaintiff.

And the defendants each one of them took advantage of all the discovery that the CPLR allowed them. Not content to rely on any prior deposition of the plaintiff or each other or any previously conducted physical, each impleaded defendant conducted its own deposition and engaged its own physician for a physical examination of the plaintiff.

Having uncovered this wealth of information, the judge was not surprised to find the trial bags of each counsel stuffed with endless volumes of EBT's and physician reports.

The judge then turned his attention to the respective defendants as their identities were disclosed on the case card. To the question: How much do you have on the case?, each defendant politely but firmly reminded the court of their great respect for his honor, their interest in disposing of cases, in general, but their inability to offer any money at this time.

Nine defendants all with a no-pay positions noted the judge. This certainly is going to test my unquestioned settlement abilities, he mused to himself.

"Anyone have any objection if I talk to the plaintiff privately," said the judge.

None at all chorused a few of the lawyers.

Talk some sense into him too, laughed one of the defendants.

The judge and the plaintiff's lawyer left the robing room briefly.

"Whaddaya really want?" said the judge. "Your number is off the wall. A buck and a quarter for a chip fracture of the wrist, that's ridiculous."

"Judge," whined the plaintiff's lawyer, "you're being unfair. You're asking me to bid against myself. The defendants haven't offered a cent."

"I know, I know," sighed the judge, "but you know they won't bid against an off-the-wall number." "Look judge," said the lawyer, "between you and me I'd take 50 today only."

"Well that's some movement anyway," noted the judge. "But your demand is still too high. Let's go back inside." "All right fellas," said the judge; "I'm going to put a number on this case."

"Your recommendations are always given great weight by us," said the representative of one of the defendant construction companies.

"First," said the judge, "We have to look at the issue of liability here. You know this is a very old case. It's not a comparative case," he said turning to the plaintiff. "It's a contrib case. Your guy could be turned out completely."

"I'll take my chances with a jury," judge.

"We're just talking for the purposes of settlement, counselor," said the judge.

"Judge," said the TA's lawyer. "Take a look at the face sheet from the hospital report," and he handed the report to the judge. "It says right on the sheet, AOB. The guy had alcohol on his breath. He was probably drunk."

"You know you can't get that in," said the plaintiff's lawyer.

"All right fellas," said the judge. "Based upon my review of this case and its problems, I'd recommend $20,000."

The judge asked the plaintiff's lawyer to leave the room. Suddenly, he turned with a fury on the defendant's lawyers.

"Listen, I don't intend to spend two weeks listening to this diddlysquat case. You better come up with some money fast," threatened the judge.

"Your Honor, with all due respect you're not being fair. This is a garbage case."

A moment of reflection followed. The learned jurist was furiously jotting down figures on a scrap of paper.

"O.K. here it is," said the judge. "I want you and you (pointing at the City and Con Ed) to pay $2,500 each. Let's see, that's $5,000; the rest of you throw in $1,000 apiece. That will bring it to $12,000. I think I can squeeze the plaintiff's lawyer at this number. How about it?"

"Judge," said the lawyer from Perez, "why should I pay the same as these others, pointing to some of his brethren. 1 never was in the area at all."

"I don't care if you were in the area," growled the judge, "you are in the case."

The judge turned toward the representatives of the City and Con Edison. "I want $2,500 from each of you."

"Judge, with all due respect, we're not in this case," said the City's representative. "As a token of our good faith however, we will match Con Ed's generous offer of $500."

All of a sudden as if deflated, the judge sank deep into his leather chair, seemingly beaten down by the tensions and disappointments of the settlement conference. A few more moments of silence followed as the judge, known as one of the top settlers in the system, thought of a way to extricate himself from this ignominy. After a few moments of intensive thought, the judge retired to a private room where he made a succession of short telephone calls.

Emerging from his conversation, the judge took one more look around the room and said: "Any change of position?"

The room was quiet.

"All right, folks, it's official. I'm 325-d'ing this case." That argot meant to all the experienced practitioners that a Supreme Court Justice could transfer a case to a lower court, the Civil Court, if it was felt that the case didn't present itself as worthy of Supreme Court attention. It would be re-calendared as a Civil Court case but in all other respects be tried as if it were still venued in the Supreme Court. Plaintiffs' lawyers were almost always opposed to such calendaring as the case would disappear from attention even further and it was felt that such transfer diminished the overall value of the case.

"Judge, that's unfair," said the plaintiff's lawyer. "I won't get a trial for a year or two."

"I anticipated this problem" replied the judge, "and due to the cooperation of two administrative judges, this matter is not only being transferred under CPLR 325-d to the Civil Court, it is being directed to trial there immediately!"

Get out of here all of you. You have 10 minutes to get over to 111 Centre Street, Room 1204. There's a judge ready to take you right now.

Stunned by this new turn of events and the unusual procedure employed, the plaintiff's counsel and the nine defense lawyers and their assistants slowly left the courtroom, their trial bags bulging with the weight of the numerous deposition transcripts, hospital records, medical records and trial notes.

And up on the 12th floor of 111 Centre Street, the judge before whom this important matter would be heard, sat proudly in his robe awaiting the trial lawyers from the Supreme Court. Recently elevated from the bowels of Housing Court, the judge had only moments before been told by his administrative judge that he was being assigned the task of hearing a complex and important tort matter, en route at that very moment from the Supreme Court.

"Before I send you down to pick" said this junior member of the bench, surprised at the ease with which he could engage in the lingo of the trial bar, "is there any possibility of resolving this matter?"

"Of course," said one of the defense lawyers, "and if anyone can settle it judge, it's you. We've heard about your reputation for settling cases in Housing Court."

The judge, obviously pleased by this accolade from such an important member of the trial bar, looked over the tired assemblage and said.

So, tell me, what's this case about?

DAVID B. SAXE served for over 35 years on the New York State Judiciary, the last 19 years as an Associate Justice of the Appellate Division, First Department. He is currently a partner at Morrison Cohen. This essay will appear in his forthcoming book, "My Life as a Judge."

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